Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1675

In the Supreme Court of the United States

OCTOBER TERM, 1979

FELIX JOSEPH VICKNAIR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Abney v. *United States*, 431 U.S. 651 4

American Export Lines, Inc. v. *Alvez*, No. 79-1 (May 12, 1980) 4

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 4

Cobbledick v. *United States*, 309 U.S. 323 5

Cogen v. *United States*, 278 U.S. 221 4

DiBella v. *United States*, 369 U.S. 121 4

Hamilton Shoe Co. v. *Wolf Bros.*, 240 U.S. 251 5

Jones v. *United States*, 362 U.S. 257 5

Rawlings v. *Kentucky*, No. 79-5146 (June 25, 1980) 5

United States v. *MacDonald*, 435 U.S. 850 4

United States v. *Salvucci*, No. 79-244 (June 25, 1980) 5

Constitution, statutes and rules:

United States Constitution, Fourth Amendment 1, 5

18 U.S.C. 3731 1

21 U.S.C. 841(a)(1) 1

21 U.S.C. 952(a) 1

21 U.S.C. 960(a)(1) 1

Page

Constitution, statutes and rules—Continued:

21 U.S.C. 963 1

Sup. Ct. R.:

Rule 21.1(a) 5

Rule 23(1)(c) 5

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1675

FELIX JOSEPH VICKNAIR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that evidence against them was obtained in violation of their Fourth Amendment rights.

1. In an indictment returned in the United States District Court for the Southern District of Florida, petitioners were charged with importation of 29,000 pounds of marijuana, possession of the marijuana with intent to distribute it, and conspiracy to commit those offenses, in violation of 21 U.S.C. 841(a)(1), 952(a), 960(a)(1), and 963. Finding that the seizure of evidence on December 14, 1977, had resulted from a prior illegal search that violated petitioners' Fourth Amendment rights, the district court granted petitioners' motion to suppress. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals reversed and remanded the case for trial (Pet. App. 1-21).

The evidence adduced at the hearings on the motion to suppress showed that on November 23, 1977, police in Coral Gables, Florida, initiated surveillance of a large boat, the "Sky Top II," moored in waters behind a private residence. Based on the report of a neighbor and an independent federal investigation, the police suspected that the vessel was involved in marijuana smuggling (Pet. App. 2-3). On November 25, 1977, the police and a Customs officer knocked on the front door of the residence but received no response. They then boarded and searched the vessel.[1] Although nothing was seized from the boat, the officers observed that the interior was cluttered and had few of the normal amenities even though the vessel appeared on the outside to be a pleasure craft. The officers disembarked and knocked on the back door of the house, but again there was no answer. While returning to the car, the officers detected what they believed to be the odor of marijuana coming from an air conditioning vent on the side of the house (*id.* at 3).

The house and boat were thereafter kept under reduced surveillance. On December 13, however, the police received information that the "Sky Top II" had left its dockage despite the presence of rough seas, and they resumed a more intensive watch at the dock and initiated a search of the coast (Pet. App. 3-4). The vessel eventually returned on the night of December 14. While the ship was being unloaded, the police arrested petitioners and seized more than 29,000 pounds of marijuana (*id.* at 1, 4).

The district court found that Felix B. Vicknair, father of the three Vicknair petitioners, owned the house at which the "Sky Top II" had been docked and was president of a corporation that owned the boat. Petitioners

---

[1]The government conceded in the court of appeals that this search was illegal.

Felix J. Vicknair and Paul Vicknair were officers and shareholders of the corporation. In addition, each of the Vicknair petitioners had received permission at various times from Felix B. Vicknair to stay in the house or to use the vessel. The Vicknairs could come and go as they wished; other petitioners could board the boat only after first receiving the permission of Felix B. Vicknair, and they could use the house only with the approval of Felix B. or petitioner Felix J. Vicknair. Petitioner Robert Vicknair lived in the house on a full-time basis in November 1977; petitioner Paul Vicknair lived in the house during part of that month. Petitioner Mell also lived in the house during November 1977 but seldom had been aboard the boat. Petitioner Morgan had slept on board the boat on and before November 25, 1977, and had previously stayed in the residence. Petitioners Joseph and Russell Kersting had performed repairs on the vessel and shared a key; Joseph left his tools and clothes on board, while Russell occasionally stayed on the boat overnight. Petitioner Picker had stayed in the house and had been on board the vessel six or seven times; petitioner Kline has been on board a few times; petitioner Buckbee had performed repairs on the boat, had access to the keys, and had occasionally stayed on the boat (Pet. App. 2, 4-5 & n.3).

2. On the government's appeal of the district court's suppression order, the court of appeals reversed (Pet. App. 1-21). After rejecting petitioners' "automatic standing" argument (*id.* at 10-12), the court concluded that none of the petitioners had a reasonable expectation of privacy that was implicated in the November 25 search of the "Sky Top II" because they did not own the vessel, had not resided aboard it, and had shared their use of it with an indeterminate number of other people over whom

they had no control (*id.* at 13-17). In addition, the court found that, assuming petitioners had "standing," the November 25 search of the house neither produced evidence against them nor tainted the December 14 search and seizure (*id.* at 18-21).

3. Review of the instant case by this Court would be premature, since criminal charges are currently pending against petitioners in the district court. The interlocutory ruling of the court of appeals pertains merely to the admissibility of evidence at petitioners' future trial—a trial that has already been substantially delayed[2]—and thus it places petitioners in the same position they would have occupied if the district court had denied the motion to suppress in the first instance. Such a denial would not have been subject to pretrial appeal. See *United States* v. *MacDonald,* 435 U.S. 850, 853-856 (1978); *Abney* v. *United States,* 431 U.S. 651, 659 (1977); *DiBella* v. *United States,* 369 U.S. 121 (1962); *Cogen* v. *United States,* 278 U.S. 221 (1929). The same considerations that counsel against a defendant's interlocutory appeal of the denial of his suppression motion militate against interlocutory review of the present suppression issue by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.,* 389 U.S. 327 (1967); see also *American Export Lines, Inc.* v. *Alvez,* No. 79-1 (May 12, 1980), slip op. 3; *id.* at 3, 4-5 (Marshall, J., dissenting). In particular, petitioners may be acquitted at trial, in which event their claim will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will then be able to present all their contentions to this Court by seeking review of the final

---

[2]Petitioners were indicted on February 22, 1978.

judgment. See *Hamilton Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

4. In any event, petitioners' contention is without merit. The sole question presented in the petition is whether the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960), entitles a defendant charged with a possessory offense to challenge a search that, although not producing evidence against him, led to a second search during which the contraband was seized (Pet. 2). This issue concerning the scope of *Jones* is now immaterial in light of the recent decision in *United States* v. *Salvucci*, No. 79-244 (June 25, 1980), which overturned the "automatic standing" rule. Accordingly, petitioners can no longer invoke that doctrine to establish "standing," and their objections to the court of appeals' application of the rule in this case are moot. Moreover, while petitioners were aware of the pendency of *Salvucci* at the time the petition was filed (see Pet. 10 n.2), they have raised no question concerning any claim of "actual standing," and therefore any such issue is not before the Court. See Rule 21.1(a) and former Rule 23(1)(c) of the Rules of this Court.[3]

---

[3]At all events, for the reasons stated in its opinion (Pet. App. 12-21), upon which we rely, the court of appeals correctly determined that the seizure of evidence on December 14 did not violate petitioners' Fourth Amendment rights. See also *United States* v. *Salvucci, supra*, slip op. 7-9; *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 5-7.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

AUGUST 1980

DOJ-1980-08